Lim Kai Lin (a child or minor represented by her litigation representative Lim Joon Hwa and Saw Eng Bee) v Pendaftar Besar Kelahiran dan Kematian, Malaysia

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW NO BA-25–65–11 OF 2017
ABD MAJID JC
4 DECEMBER 2018

Administrative Law — Judicial Review — Application for — Judicial review against decision of National Registration Department — National Registration Department dismissed applicant's application to be registered as citizen of Malaysia — Whether applicant exhausted all avenues before making application — Federal Constitution art 15A

The applicant was born in Poliklinik & Pusat Bersalin An-Najihah in Nilai, Negeri Sembilan on 20 October 2004 and was issued with a birth certificate exh LKL2 where Lim Joon Hwa ('Hwa') and Saw Eng Bee ('Bee') were registered as her biological parents. Upon attaining the age of 12, she applied for her identity card. Her application was held up by the National Registration Department Malacca ('NRD') when the official noticed that her appearance and her skin colour did not resemble Hwa who claimed as her biological father. Based on the investigations carried out by NRD, both Hwa and Bee admitted that they were not the biological parents of the applicant. They thereafter applied to make corrections pertaining to the details in the Birth and Death Registration of the applicant and therein they affirmed under oath that they were not the applicant's biological parents. Subsequent thereto, they applied and obtained the adoption certificate from Malacca Session Court and obtained exh RA9 where the status of the applicant remained as non-citizen. The applicant argued that the respondent failed to offer any reasonable reason for confiscating the subject's birth certificate and the subject should be treated as a Malaysian citizen. The learned counsel for the respondent argued that the present application was premature in that the applicant ought to have exhausted all avenues available before seeking the present court to review the decision of the respondent. The applicant through Hwa and Bee filed a judicial review for: (a) a declaration that the applicant was a citizen of Malaysia by operation of law; (b) an order of certiorari to quash the decision of the respondent in issuing the birth certificate; and (c) an order of mandamus to command the respondent to reissue the birth certificate stating her status as a citizen.

Held, dismissing the applicant's application:

(1) The applicant ought to have exhausted the avenues available before they could come to the present court for judicial review. The court disagreed with the contention of the learned counsel for the applicant that in the application for the identity card, the government could apply art 15A of the Federal Constitution as citizenship was separate and distinct from identification papers which was issued once a person reached the age of 12 (see para 10).

(2) As regards to the failure to give any reason for the decision in revoking the earlier birth certificate, the discretion was given to the registration officer. When all the particulars required were furnished, the identity card would accordingly be issued but not otherwise. In the present case, there was a cause to suspect according to the registration officer when the applicant was brought before him. The inquiry was duly carried out and both Hwa and Bee admitted that the applicant was not their biological daughter. In such circumstances, there was no requirement for the registration officer to give further reason for revoking the birth certificate issued earlier (see para 13).

[Bahasa Malaysia summary

Pemohon telah dilahirkan di Poliklinik & Pusat Bersalin An-Najihah di Nilai, Negeri Sembilan pada 20 Oktober 2004 dan telah diberikan sijil kelairan eksh LKL2 yang mana Lim Joon Hwa ('Hwa') dan Saw Eng Bee ('Bee') telah didaftarkan sebagai ibu bapa kandungnya. Setelah mencecah umur 12 tahun, dia telah memohon kad pengenalannya. Permohonannya telah ditangguhkan oleh Jabatan Pendaftaran Negara Melaka ('JPN') apabila pegawai pejabat memerhatikan bahawa penampilannya dan warna kulitnya tidak menyerupai Hwa yang mendakwa sebagai bapa kandungnya. Berdasarkan siasatan yang dijalankan oleh JPN, kedua-dua Hwa dan Bee mengakui bahawa mereka bukan ibu bapa kandung pemohon. Mereka kemudian telah memohon untuk membuat pembetulan berkaitan butir-butir dalam Pendaftaran Kelahiran dan Kematian pemohon dan mereka telah mengesahkan dengan mengangkat sumpah bahawa mereka bukan ibu bapa kandung pemohon. Berikutan itu, mereka telah memohon dan memperoleh sijil anak angkat daripada Mahkamah Sesyen Melaka dan memperoleh eksh RA9 di mana status pemohon kekal sebagai bukan warganegara. Pemohon berhujah bahawa responden telah gagal memberikan apa-apa sebab munasabah untuk merampas sijil kelahiran subjek dan subjek patut dianggap sebagai warganegara Malaysia. Peguam yang bijaksana untuk responden berhujah bahawa permohonan ini adalah pramatang yang mana pemohon patut menggunakan semua jalan yang ada sebelum memohon mahkamah ini mengkaji semula keputusan responden. Pemohon melalui Hwa dan Bee telah memfailkan semakan kehakiman untuk: (a) satu deklarasi bahawa pemohon ialah seorang warganegara Malaysia melalui operasi undang-undang; (b) satu perintah certiorari untuk membatalkan keputusan responden kerana

A mengeluarkan sijil kelahiran; dan (c) satu perintah mandamus untuk memerintahkan responden untuk mengeluarkan semula sijil kelahiran yangmenyatakan statusnya sebagai seorang warganegara.

Diputuskan, menolak permohonan pemohon:

B (1) Pemohon patut menggunakan jalan yang ada di hadapan mereka sebelum mereka ke mahkamah ini untuk semakan kehakiman. Mahkamah tidak bersetuju dengan hujah peguam yang bijaksana untuk pemohon di mana dalam permohonan untuk kad pengenalan, kerajaan C boleh memohon perkara 15A Perlembagaan Persekutuan kerana kewarganegaraan adalah berasingan dan berbeza daripada dokumen-dokumen pengenalan yang dikeluarkan setelah seseorang itu mencapai umur 12 tahun (lihat perenggan 10).

D (2) Berhubung kegagalan untuk memberikan apa-apa sebab untuk keputusan membatalkan sijil pengenalan yang terdahulu, budi bicara diberikan kepada pegawai pendaftaran. Apabila semua butir-butir yang diperlukan telah dikemukakan, kad pengenalan sewajarnya akan dikeluarkan dan tidak begitu jika sebaliknya. Dalam kes ini, terdapat E sebab untuk mensyaki menurut pegawai pendaftaran apabila pemohon dibawa mengadapnya. Siasatan telahpun dijalankan dan kedua-dua Hwa dan Bee mengakui bahawa pemohon bukan anak kandung mereka. Dalam keadaan sedemikian, tiada keperluan untuk pegawai pendaftaran memberikan sebab selanjutnya untuk membatalkan sijil kelahiran yang F dikeluarkan terdahulu (lihat perenggan 13).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 329–407.

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Cases referred to

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)

H *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308, CA (refd)

Legislation referred to

I Federal Constitution art 15A, Second Schedule, Part III, s 2
National Registration Regulations 1990 regs 4, 5(1), 21

Khoo Ai Theng (Ng Kee Way & Co) for the appellants.
Maisarah Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Abd Majid JC:

[1] Lim Kai Lin ('the applicant') through Lim Joon Hwa ('Hwa') and Saw Eng Bee ('Bee') before this court is seeking for:

(a) a declaration that she is a citizen of Malaysia by operation of law;

(b) an order of certiorari to quash the decision of the respondent in issuing the birth certificate namely exh LKL3; and

(c) an order of mandamus to command the respondent to re-issue a birth certificate stating her status as a citizen.

BACKGROUND FACTS

[2] The applicant was born in Poliklinik & Pusat Bersalin An-Najihah in Nilai, Negeri Sembilan on 20 October 2004 and was issued with a birth certificate exh LKL2 where Hwa and Bee were registered as her biological parents. Upon attaining the age of 12 she applied for her identity card. Her application was held up by the National Registration Department Malacca ('NRD') when the official noticed that her appearance and her skin colour did not resemble Hwa who claimed as her biological father.

[3] Based on the investigation carried out by the NRD both Hwa and Bee admitted that they were not the biological parents of the applicant — exhs RA3–5.

[4] They thereafter applied to make corrections pertaining to the details in the birth and death registration of the applicant and therein they affirmed under oath that they were not the applicant's biological parents (exh R6). Subsequent thereto they applied and obtained the adoption certificate from the Malacca Sessions Court and obtained exh RA9 where the status of the applicant remains as non-citizen.

APPLICATION

[5] In this application the applicant raised the following complaints:

(a) the respondent failed to offer any reason/ground for confiscating the subject's birth certificate LKL2; and

(b) the subject should be treated as a Malaysian citizen.

[6] In response, the learned SFC contended that:

(a) the officer of the NRD suspected that the applicant's physical appearance did not resemble the couple;

(b) this prompted an investigation to be carried out and it was discovered that the Hwa and Bee were not the applicant's biological parents;

(c) Hwa and Bee in fact applied for an adoption certificate and obtained the same in Malacca Sessions Court; and

(d) there is no proof to show either her biological parent is a citizen.

[7] It was also raised by the learned SFC that the applicant must exhaust all avenues before the reliefs can be sought from this court.

ANALYSIS AND DECISION

[8] I will deal with whether this application is premature in that the applicant ought to have exhausted all avenues available before seeking this court to review the decision of the respondent.

[9] The learned counsel for the respondent submitted that there was an alternative remedy or avenue for the applicant and she referred to art 15A of the Federal Constitution which states as follows:

> 15A Special power to register children
>
> Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

Such application is to be made to the Minister as provided in s 2 Part III of the Second Schedule of the Federal Constitution. There is nothing shown in the affidavit that the applicant has attempted to resort to this provision. In *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308 the where the facts are on all fours with this application, the Court of Appeal speaking through Abang Iskandar JCA (as he then was) at p 325 said as follows:

> [41] Lest we forget, it was also argued before us that the respondent had not exhausted his avenue for redress. In the case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505 it was held by the apex court that an applicant seeking discretionary reliefs, including for certiorari and mandamus, must first exhaust all avenues open to him before running to the court for such reliefs. Learned Justice Heliliah Mohd Yusof FCJ held that:
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> > [22] ... the appellant requested the High Court to invoke its residual powers and as succinctly stated by Sir John Donaldson MR in *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257:
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> > But it is a cardinal principle that, save in the most exceptional circumstances,

that jurisdiction will not be exercised where other remedies were available and have not been used.

[23] Even if the process invoked here had indeed been the process of judicial review in the true sense, this court will only be exercising a supervisory and not an appellate function. Lord Templeman in his speech in *In re Preston* [1985] 1 AC 835 observed:

Judicial review process should not be allowed to supplant the normal statutory appeal procedure.

[42] In this case, the respondent could still apply to be a citizen by applying an invocation of art 15A of the Federal Constitution, namely application for citizenship by way of registration for consideration by the Minister. We noted too that he had written to respondent on that avenue but that the request was turned away without it being considered by the honourable Minister. That would mean that his request had not been subject to the honourable Minister's consideration. In other words, he had not exhausted his available avenue for redress. That avenue is still available for him to explore.

[10] I agree with the learned SFC's contention that the applicants ought to have exhausted the avenues available before they can come to this court for JR based on the authorities cited. I cannot agree with the contention of the learned counsel for the applicant that in the application for the identity card the government could apply art 15A as citizenship is separate and distinct from identification papers which is issued once a person reaches the age of 12.

[11] As regards the failure to give any reason for the decision in revoking the earlier birth certificate, in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590 at p 620 Balia Yusof JCA (as he then was) said as follows:

[88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then, perhaps the need to give reason by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of the duty to give reasons. Lord Mustill in the House of Lord case of *Doody v Secretary of State for the Home Department; and other appeals* [1993] 3 All ER 92 said:

I accept without hesitation ... that the law does not at present recognize a general duty to give reasons for an administrative decision. *Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied*. (Emphasis added.)

[89] In our view, in exercising his powers and/or discretion and making a decision under s 12 of the TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. Being in that

position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision.

[12] Regulation 4 of the National Registration Regulations 1990 provides as follows:

Any person who —

(a) is required to register under regulation 3;

(b) is required to re-register under regulation 18 or 28; or

(c) applies for a replacement identity card under regulation 13 or 14, shall —

(aa) forward two copies of his photograph to the registration officer or permit the registration officer to take his photograph, as the case may be;

(bb) submit to all such steps as may be reasonably necessary —

(i) for the taking of his photograph; and

(ii) for the taking and recording of his fingerprints impressions, in accordance with any instructions given by the registration officer; and

(cc) give the following particulars to the registration officer:

(i) his full name as appearing in his Certificate of Birth or such other document, and if he is known by different names, each of such names in full;

(ii) his previous identity card number, if any;

(iii) the full address of his place of residence within Malaysia;

(iv) his race;

(v) his religion;

(vi) his place of birth;

(vii) his date of birth and sex;

(viii) his physical abnormalities, if any;

(ix) his citizenship status, whether a citizen of Malaysia or a citizen of any other country;

(x) particulars of his driving licence, if any;

(xi) particulars of his passport, if any;

(xii) any other particulars as the registration officer may generally or in any particular case consider necessary for the purpose of identification; and

(xiii) any other documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted.

Sub-regulation 5(1) of the National Registration Regulations 1990 provides as follows:

> (1) The registration officer may at his discretion issue to the person giving the particulars referred to in regulation 4 an identity card as prescribed in subregulation (2) of this regulation containing a copy of such person's photograph, fingerprints impressions and such other particulars as may be necessary for his identification.

[13] Looking at the scheme of the Regulations discretion is given to the registration officer to issue the identity card. When all the particulars required are furnished the identity card would accordingly be issued but not otherwise. In the present case there was a cause to suspect according to the registration officer when the applicant was brought before him and he was empowered under reg 21 to conduct an inquiry which reads as follows:

> (1) A registration officer may, for the purpose of carrying out provisions of these Regulations and any order made under —
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> (a) call upon any person to appear before him to answer any question which he may consider it reasonably necessary to ask him for such purpose;
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> (b) require —
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> (i) any person applying for registration under the Regulations; or
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> (ii) any person registered under these Regulations;
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> (iii) any person exempted from registration under the Regulations;
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> (iv) to make further declaration or furnish further particulars or documents as he may reasonably require; or
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> (c) impound any document produced to him in connection with any application for registration or for a replacement identity card if he has reason to doubt its genuineness correctness or validity of the issue thereof.
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> (2) A registration officer may administer any affirmation or statutory declaration which may be required for the purposes of these Regulations, and any person summoned before him under these Regulations may be examined by him on affirmation.

The inquiry was duly carried out and both Hwa and Bee admitted that the applicant was not their biological daughter. In such circumstances, I do not see any requirement for the registration officer to give further reasons for revoking the birth certificate issued earlier.

[14] Hwa and Bee could not provide who are the biological parents of the applicant and whether her parent is a Malaysian citizen. In *Pang Wee See* at p 325 Abang Iskandar JCA (as he then was) held:

> We are unanimous in our view that an adoption order issued under the Adoption

A Act 1952 does not confer Malaysian citizenship to an adopted child although one of his adoptive parents is a Malaysian citizen or a person permanently resident in Malaysia by operation of law, within the contemplation and ambit of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution. To be a Malaysian citizen by operation of law under the provisions of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution, the person must be born in Malaysia and one of his *biological* parents is at the time of his birth, either a Malaysian citizen or a person who is permanently resident in Malaysia. In this appeal before us, the applicants did not fulfil the crucial biological, or the *jus sanguinis*, criterion as envisaged under the said article.

[15] Based on the above discussion, the application for judicial review is dismissed.

Applicant's application dismissed.

Reported by Mohd Kamarul Anwar